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*Representing the United States of America*

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

**United States Of America,**

**Plaintiff,**

**V.**

**Joshua A. Martinez,**

**Defendant.**

**Case No. 2:21-cr-00219-APG-DJA**

**Government's Response To Defendant's  
Sentencing Memorandum, ECF No. 90**

**CERTIFICATION: This response is timely filed.**

**I. INTRODUCTION**

Joshua Martinez threatened to kill the deputy district attorney and detective involved in his state felony conviction. A threat investigation lead to the discovery of firearms and ammunition in Martinez's Las Vegas residence and Moapa property. After being indicted on felon in possession of a firearm and ammunition charges, Martinez was released on conditions of pretrial release, including home detention and GPS monitoring, both to reduce the risk of danger that he presented to the prosecutor and detective.

1 Eventually, Martinez he pled guilty to one count of possession of a single firearm – one  
2 capable of accepting a large capacity magazine. The nature and circumstances of  
3 Martinez’s offense, his history and characteristics, the need for the sentence to reflect the  
4 seriousness of the offense, and other 3553(a) factors, support a sentence within the  
5 applicable Sentencing Guideline range. But Martinez seeks a sentence of time served and  
6 one-year of supervised release. His argumets fail to account for the full scope of the 3553(a)  
7 factors.

## 8 **II. PROCEDURAL HISTORY**

9 Martinez was charged on September 1, 2021, in a four-count federal indictment  
10 with being a felon in possession of firearms and ammunition. ECF 1. Martinez was then  
11 released on a personal recognizance bond subject to pretrial release conditions, including  
12 home detention in Moapa, Nevada, and GPS monitoring. ECF 13. The Court found that  
13 Martinez presented a risk of danger to the prosecutor and detective. ECF 6 and 13.

14 The home detention condition provided an exception for employment, allowing  
15 Martinez to travel within six miles of his home for times he was permitted to leave his  
16 home, and to travel to Las Vegas under strict limits for matters related to his case and his  
17 family. ECF 13. Martinez filed four motions to modify his release conditions. Only slight  
18 modifications were made.

19 Martinez pled guilty on August 17, 2023, to count two of the indictment charging  
20 him with felon in possession of a firearm.

21 Ten total stipulations to continue the trial and sentencing were filed. Eight of the  
22 stipulations were solely for Martinez’s benefit.

### III. FACTUAL STATEMENT

For years Martinez had engaged in anti-government and anti-law enforcement activities. He identified a First Amendment Auditor, that is, someone who created confrontational situations with law enforcement officers or other public authority to create video recordings for social media, such as YouTube channels. Martinez has a long criminal history that spans nearly twelve years, and includes of violence. Additionally, he was convicted twice of crimes stemming from his conduct at the Lloyd D. George Federal Courthouse, each arising out of his anti-law enforcement ideologies: (1) in 2017 for Obstructing and providing false information to a police officer, in connection with his attempt to enter the Lloyd D. George Federal Courthouse without proper identification; and (2) in 2018 for creating a disturbance of federal property, again involving his attempt to enter the Lloyd D. George Federal Courthouse without proper identification.

Martinez came into contact with the prosecutor and detective no later than 2017 when the prosecutor prosecuted Martinez for attempt carrying concealed firearm or other deadly weapon (a felony), and the detective went to court once to help the prosecutor. Martinez has since held a grudge against them.

Martinez pled guilty to the state charge in 2019, and a month later his probation was revoked. The revocation stemmed from officers finding firearms and contraband in Martinez's house during a home verification visit. They found firearms, a glass jar containing marijuana residue, and a box of "P-Sure synthetic urine located in Martinez's bedroom. During Martinez's sentencing hearing, the court learned that Martinez had posted several times on Facebook posts glorifying the killing of police officers. ECF 40 at 3. One post contained a picture of a police funeral and a statement implying cops should die. *Id.*

1 Martinez continued to post violent messaging directed toward law enforcement. On  
2 December 9 and 22, 2020, and on January 2, 6 and 7, 2021, he posted pictures advocating  
3 violence toward law enforcement officers and public authorities. In the December 9, 2020,  
4 and January 6, 2021 posts, he posted statements advocating violence specifically toward  
5 the detective. ECF 40, pp. 4-5.

6 Martinez also posted death threats against the prosecutor and detective on February  
7 17 and 18, 2021. Late on February 17, Martinez called LVMPD on its 311 recorded line to  
8 speak with the detective about personal property he claimed the detective had taken from  
9 him. *Id.* at 5-6. A few minutes later, Martinez posted to his Facebook page a picture of the  
10 prosecutor in a court setting with the following statement: “This is [the prosecutor]. He is  
11 [the detective’s] Bitch. [Prosecutor], I hope YOU and [the detective] die a slow and painful  
12 death. I hope your family witness [sic] it. [Detective], I have a message for you (Molon  
13 Labe).” *Id.* at 6. According to a now-retired LVMPD sergeant, Molon Labe is a classical  
14 Greek phrase meaning “come and take it (them),” and is used by present-day gun rights  
15 advocates as a challenge to perceived attempts by the government to confiscate firearms. *Id.*  
16 According to the sergeant, it was reasonable to believe that Martinez used the language to  
17 provoke a confrontation with the detective. *Id.* at 6-7.

18 An hour or so after Martinez posted the Molon Labe threat, he posted on Facebook  
19 a statement saying “I cant [sic] wait to see the news and hear that [the detective] is in the  
20 casket,” along with he posted a picture of nine police officers carrying a flag-draped coffin.  
21 *Id.* at 7. On February 18, 2021, LVMPD executed search warrants on Martinez’s  
22 residences in Las Vegas and Moapa, and seized numerous firearms and ammunition. At  
23 the same time, Martinez was arrested on state charges of aggravated stalking (felony),  
24

1 stalking with use of the internet or electronic communication (felony), and ownership or  
 2 possession of firearm by prohibited person (felony). Later, Martinez was charged in federal  
 3 court with the firearm and ammunition charges.

#### 4 **IV. ARGUMENT**

5 The 3553(a) factors compel a Guideline sentence. In particular the factors  
 6 addressing the nature and circumstances of the offense, the defendant's history and  
 7 characteristics, and the need for the sentence to reflect the seriousness of the offense weigh  
 8 heavily in favor of a Guideline sentence.

##### 9 **A. The 3553(a) Factors Compel a Guideline Sentence.**

10 In imposing sentence, the Court must consider the 3553(a) factors. They include,  
 11 among others:

12 (1) The nature and circumstances of the offense and the history and  
 13 characteristics of the defendant;

14 (2) The need for the sentence imposed—

15 (A) to reflect the seriousness of the offense, to promote respect for the  
 16 law, and to provide just punishment for the offense;

17 (B) to afford adequate deterrence to criminal conduct;

18 (C) to protect the public from further crimes of the defendant....

19 18 U.S.C. § 3553(a). The nature and circumstances of the offense here reflect serious and  
 20 dangerous criminal activity. Martinez used the firearm of his conviction in relation to his  
 21 threats against the prosecutor and detective.<sup>1</sup> To be sure, he directed the Molon Labe  
 22

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23 <sup>1</sup> The plea agreement did not include a two-level adjustment under § 2K2.1(b)(6)(B) for “use[] or possession [of] any  
 24 firearm or ammunition in connection with another felony.” The government is not arguing for the adjustment under  
 this guideline provision and urges the Court not to include the adjustment.

1 phrase towards the detective and followed up minutes later by posting a picture of nine  
2 police officers carrying a flagged-draped coffin along with his statement that he can't wait  
3 to see the news and hear that the detective is in the casket. He made other threatening  
4 statements.

5 The threatening statements were not one-offs. Even before he posted the Molon  
6 Labe post and the coffin post, Martinez posted in December 2020 a threatening statement  
7 directed toward the detective, and in December 2020 and January 2021 he posted  
8 statements directed generally toward law enforcement and other public officials, some  
9 implying death. He knew better than to do so. His state probation had been revoked in  
10 2019 in part because he had posted similar statements. Martinez's revocation should have  
11 tempered him – it only seemed to have aggravated him more.

12 There is more. Martinez's anti-law enforcement ideologies led to his misdemeanor  
13 convictions, those involving his disturbances at the federal courthouse. ECF 74, p. 10 and  
14 12. And even further back, Martinez showed violent behavior and disregard for human life  
15 when in 2009 he pointed a gun at his then-girlfriend's father, then shot at him from a  
16 vehicle. ECF 74, p.9. Then moving forward, in 2012, Martinez was convicted of  
17 misdemeanor battery for hitting a person. *Id.* at 10.

18 Martinez's threats and other criminal conduct strongly support a Guideline  
19 sentence.

20 **B. The 3553(a) Factors Do Not Support Martinez's Request for a Time-served**  
21 **Sentence and One Year of Supervised Release**

22 Martinez makes five arguments for a time-served sentence and a term of one-year of  
23 supervised release. None adequately support the sentence Martinez seeks, while the totality  
24 of the 3553(a) factors further undermines his request.

1                   **1.       The Three Years Martinez Has Spent on Pretrial Release Is of His**  
2                   **Own Making and Do Not Justify a Below-Guideline Sentence.**

3           The three years Martinez has spent on pretrial release is of his own making. At the  
4           detention hearing, the Court found that Martinez posed a risk of danger to others, and  
5           placed on him the restrictive release conditions. The Court did so to assure the safety of the  
6           victims and the community. He does not deserve a break based on the restrictive he  
7           brought upon himself.

8           Moreover Martinez is primarily responsible for the three years he has spent on  
9           pretrial release. Eight of the ten continuances were sought by Martinez for his benefit.

10          Finally, Martinez should not expect to receive a benefit based on his having  
11          complied with the conditions of his release. He is expected to comply with the conditions  
12          and faced potential consequences for not doing so. He should not expect a benefit just  
13          because he did what was required of him.

14          In the end, the nature and circumstances of Martinez's offense, his history and  
15          characteristics, and the need for the sentence to reflect the seriousness of his offense dwarf  
16          Martinez' compliance with his release conditions.

17                   **2.       The Progress Martinez Has Made on Pretrial Release Does Not**  
18                   **Support a Below-Guideline Sentence, Particularly in Light of All**  
19                   **the 3553(a) Factors.**

20          While Martinez has made strides will on pretrial release, his strides pale in  
21          comparison to the 3553(a) factors. According to Martinez, while under pretrial release, he  
22          has developed a small farming business, been responsible for a family, and attended  
23          church, all commendable acts. But the totality of the 3553(a) factors were designed to help  
24          courts achieve fair and just sentences. Given the weight of the 3553(a) factors discussed  
above, a Guideline sentence should be imposed.

1                   **3.     Martinez's Criminal History Accurately Reflects the Nature and**  
2                   **Extend of His Criminal Conduct, and Is Not Overrated.**

3             Martinez's criminal history category of III accurately reflect the nature of his  
4 criminal conduct. It is not overrated. He began committing crimes when he was 19 years  
5 old and stopped when he was arrested in this case at age 32. His nature of his crimes  
6 accurately reflects the path he chose for himself. His criminal history category is not  
7 overrated.

8             Besides a driver license violation and a DUI, Martinez first crimes occurred in 2009  
9 when he was 21 years old. He shot at his girlfriend's father from a motor vehicle, showing  
10 complete disregard for human life. In the three weeks before the shooting, he repeatedly  
11 threatened to kill the father.

12            Martinez did not behave any better sixteen months later. In 2012, when he was 23  
13 years old, he committed a battery by hitting someone with his fist, again committing  
14 another act of violence. Two years later, in 2014 when Martinez was 26 years old, he was  
15 charged with DUI and later convicted of that crime.

16            Then in 2017, when he was 28 years old, he engaged in the obstructive behavior at  
17 the federal courthouse crime discussed above. And later in 2017, he was still 28 years old,  
18 he committed the crime of attempt carrying a concealed firearm or other deadly weapon,  
19 for which he was convicted in 2019.

20            Then in 2019, when he was 30 years old, he committed the other crime at the  
21 federal courthouse.

22            And in 2021, when he was 32, he committed the crime charged in this case.

23            Martinez tries to minimize his criminal history by calling it overrated. He says that  
24 studies show that when people are in their 20's, their brains are not fully developed. Maybe

1 so, but even a 21 year old with developing brain knows that shooting at a human being ins  
2 wrong and deviates from acceptable norms. In other words, at 21 years old, Martinez knew  
3 that it shooting at a human being was a serious crime.

4 But Martinez did not stop committing crimes in his 20's. He contined for nearly  
5 twelve years, into his 30's when he committed the crime at issue.

6 Given the nature of Martinez's criminal activity and the nature of it, his criminal  
7 history is not overrated.

8 **4. Martinez Has Not Shown that He Is Entitled to an Adjustment**  
9 **from the Enhancement for Possession of a Large Capacity**  
10 **Magazine Firearm.**

11 Martinez has not shown that he is entitled to an adjustment from the enhancement  
12 for possessing the firearm here because nothing shows that the Sentencing Commission  
13 promulgated the enhancement contrary to empirical evidence and national experience, and  
14 even if it did, the circumstances surrounding Martinez's possession of the firearm do not  
15 support an adjustment.

16 Martinez argues that the Sentencing Commission promulgated the enhacement in  
17 § 2K2.1 contrary to empirical date and national experience. However, he does not identify  
18 the empirical data or state what it supports. At most, he references a district court decision  
19 that barely discussed empirical evidence and granted an adjustmet based on the  
20 circumstances surrounding the defendant's possession of a firearm. Moreover the national  
21 experience Martinez reference does not support the adjustment an adjustment for him.

22 In *United States v. English*, 333 F.Supp.3d 1311 (M.D. Ala. 2018), the court found the  
23 high-capacity magazine enhancement was warranted but chose to vary downward based on  
24 the defendant's history and that the defendant had only used the firearm to hunt. In

1 analyzing the provision in the Guideline provision, the court stated that the empirical data  
2 “appear[ed] to undermine the rationale for the [Assault Weapons Ban],” that the  
3 Sentencing Commission never addressed whether the enhancement for semiautomatic  
4 firearms at issue should apply after the ban. *Id.* at 1313-1314. The court sidestepped digging  
5 into the data by granting a variance based on the defendant having sued a high capacity  
6 magazine firearm only for hunting.

7       Regarding national experience, the arguments Martinez makes also do not support a  
8 variance. The national experience he relies on is that large-capacity magazine firearms are  
9 ubiquitous in society, frequently used by non-felons, and not proscribed by many states. He  
10 also argues that large capacity magazines must not be bad because Congress allowed the  
11 ban on large capacity magazine firearms to lapse when it allowed the Assault Weapon Ban  
12 to lapse. These instances of national experience do not compel an adjustment.

13       The Sentencing Commission has the authority to conclude that possession of certain  
14 kinds of firearms by felons is especially dangerous, even if possession by the general public  
15 is not prohibited by law. *United States v. Myers*, 553 F.3d 328, 331 (4<sup>th</sup> Cir. 2009). It does not  
16 matter that the Guideline continues to provide for an enhanced punishment  
17 notwithstanding the expiration of a statute. Congress granted the Sentencing Commission  
18 substantial discretion in formulating guidelines. *Mistretta v. United States*, 488 U.S. 361, 377  
19 (1989). The Commission has the authority to determine the relative severity of offender  
20 characteristics and to determine which crimes have been punished too leniently or too  
21 severely. *Id.* The Commission has discretionary authority to determine the relative severity  
22 of federal crimes and to assess the relative weight of the offender characteristics. *Id.*

1 Consequently, Martinez's reliance on his claims of national experience do not compel a  
2 variance for him.

3 Moreover, the fallacy of Martinez's national experience argument can be seen  
4 from the following situation. Although no state imposes a restriction on the number of  
5 firearms a non-felon citizen may possess, the Sentencing Commission has provided an  
6 enhancement for felons possessing three or more firearms. No reasonable argument can be  
7 made that the Sentencing Commission acted outside its lane by promulgating an  
8 enhancement for felons that is not applied to non-felons.

9 In any event, this court has the discretion to grant an adjustment when empirical  
10 data and national experience do not support a sentencing enhancement. In *Kimbrough v.*  
11 *United States*, 552 U.S. 85, 109-110 (2007), the Court held that a sentencing court acted  
12 reasonably when it departed from the then existing Guideline for crack cocaine because  
13 empirical data and national experience did not support the 100-to-1 sentencing disparity  
14 between crack cocaine and powder cocaine.

15 Regardless of whether empirical data and national experience undermined the  
16 firearm guideline, the Court should not grant an adjustment. Unlike the defendant in  
17 *English*, Martinez did not possess the firearm for a lawful activity – hunting. Rather, he  
18 possessed his firearm in connection with his threat to kill the prosecutor and the detective.  
19 No adjustment should be granted.

1           5.     **Martinez is Not Entitled to A Departure Based on the Status of the**  
2                 **Firearm Statute in the Ninth Circuit Because the Matter is Before**  
3                 **the Ninth Circuit En Banc and a Finding of Unconstitutionality by**  
                **the Ninth Circuit Could Affect Martinez’s Conviction, Not His**  
                **Sentence.**

4           Martinez should not receive an adjustment simply because the constitutionality of the  
5 federal firearm statute is pending before the Ninth Circuit. *See United States v. Duarte*, 2024  
6 WL 34431512 (9th Cir. July 17, 2024). Although three-judge panel found the statute  
7 unconstitutional in *English*, the Ninth Circuit has decided to hear the case *en banc*. That  
8 decision returns a matter to its status before the three-judge panel’s decision. “A court’s  
9 decision to rehear a case *en banc* effectively means that the original three-judge panel never  
10 existed. This is why the original panel disposition may not be cited the very minute that a  
11 court votes to rehear a case *en banc*.” *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1186 (9th Cir.  
12 2001), overruled on another ground by *Smith v. Davis*, 953 F.3d 582, 589 (9th Cir. 2020).

13           Separately, Martinez should not receive a sentencing adjustment based on the  
14 uncertain outcome of the *en banc* decision. A reversal by the *en banc* court could entitle  
15 Martinez to a reversal of his conviction, not a reduced sentence.

16                                 **IV.     CONCLUSION**

17           Based on the foregoing, the Court should impose a Guideline sentence.  
18

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